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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1956.

No. 28.

JAMES C. ROGERS,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

## PETITIONER'S REPLY BRIEF.

### In Re Cases Cited by Respondent.

No effort will be made here to discuss the cases cited by the respondent in its brief. The factual situations in those cases are so dissimilar to the case at bar that they shed no light upon it. No case is cited which can or does overrule the pronouncements of this Court in Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; Wilkerson v. McCarthy

(1949), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. The law is firmly established and there really is only one question submitted for the Court's attention: That is, whether or not the facts in the case at bar warrant the submission of the case to the jury. The above cited cases hold in effect that we need look only to the evidence and reasonable inferences which tend to support the case of the petitioner and that whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. The facts here are decisive of the whole case.

**Respondent Erroneously Contends That Petitioner's Present Position Is Different From His Position in the Trial Court.**

It is apparent that respondent labors under a basic misconception as to petitioner's position, and a complete answer to respondent's argument may be had by resorting to the record.

In its brief, respondent attempts to escape the effect of its negligence by detaching and separating the dangers which caused petitioner's injury, and by dismissing as "new contentions" petitioner's position that all the elements of hazard must be taken together.

Respondent claims that petitioner did not rely upon the acts of negligence which petitioner now argues to this Court, and that he neither stated them in his petition nor submitted them to the jury which heard the case (Respondent's brief, page 12). There is no better way to determine whether petitioner is making "new contentions" than to look at the record. For the convenience of the Court we herewith quote verbatim the pertinent parts of the record touching these matters.

When petitioner filed his action in the Circuit Court of the City of St. Louis, Missouri, on May 27, 1953, he described respondent's negligence, in paragraph five of his petition, in these words (R. 2):

> "5. That on the said 17th day of July, 1951 plaintiff, in the scope and course of his said employment for the defendant, was engaged in burning weeds using a hand torch along defendant's right-of-way, a short distance north of 'Garner Crossing' in or near the City of Garner, State of Arkansas, and in so doing was **required to work** at a place in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger; that on the occasion herein mentioned a train did pass and did cause plaintiff to thus retreat and move quickly from the place where he was then working and to use as his place of work a part of defendant's said right-of-way adjoining its tracks that was covered with loose and sloping gravel which did not provide adequate or sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff states that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid." (Emphasis supplied.)

When this case was submitted to the jury, which returned a unanimous verdict for petitioner, the verdict-directing instruction was as follows (R. 93-94):

"The Court instructs the jury that under the law applicable to this case, it was the positive, non-delegable and continuing duty of the defendant to exercise ordinary care to furnish the plaintiff a reasonably safe place in which to work.

"In this connection, the Court instructs the jury that if you find and believe from the evidence that on the 17th day of July, 1951, the plaintiff, while acting within the scope and course of his employment for the defendant, was engaged in burning weeds using a hand torch along the defendant's right-of-way, a short distance north of 'Garner Crossing' near the City of Garner, State of Arkansas, and that while so doing, if you do so find, plaintiff was **required to work** at a place in close proximity to defendant's railroad tracks whereon defendant operated its trains, and if you further find that on the occasion in question, while one of defendant's trains was passing the place where plaintiff was working, as aforesaid, it did cause fire from said burning weeds and smoke therefrom to come dangerously close to plaintiff and that plaintiff, in the exercise of ordinary care for his own safety, if you do so find, was required to retreat and move quickly away from said danger to the culvert mentioned in evidence and to use said culvert as his place of work, which said place was covered with loose and sloping gravel, if you so find, and which said place did not provide adequate or sufficient footing for plaintiff to thus move or stand under said circumstances; **and if you further find under all the facts aforesaid, if you find them to be the facts,** that the method of doing said work and the place of work thus provided by the defendant was unsafe and dangerous and not reasonably safe and that the defendant in thus adopting said method and if you do so find, and in providing said place of work, if you do so find, did fail to exercise

ordinary care and was guilty of negligence, and that as a direct and proximate result thereof, if you do so find, the plaintiff was caused to fall and to be injured thereby, then your verdict must be in favor of the plaintiff and against the defendant herein." (Emphasis supplied.)

From the foregoing quotations it will be observed that the petitioner alleged in his petition and submitted in his instructions the following elements of hazard:

(1) That petitioner was given a hand torch to use in burning the weeds;

(2) That he was required to work at a place in close proximity to defendant's railroad tracks;

(3) That trains were permitted to move and pass the point where petitioner was required to stand;

(4) That the passing of said trains would cause fire and smoke to come dangerously close to the petitioner;

(5) That a train did pass and did cause fire and smoke to endanger the petitioner;

(6) That said fire and smoke did cause petitioner to retreat and move quickly from the place where he was then working to a place that was covered with loose and sloping gravel;

(7) That the sloping gravel did not provide adequate and sufficient footing for petitioner to move or work under the circumstances.

Looking, then, to the pleadings, instructions and petitioner's brief, can it be said that petitioner is now basing his claim to relief on grounds other than those pleaded and submitted? Not at all! From the very moment this action was filed, petitioner has contended that a combination of dangers, created by respondent's negligence, caused

his injury. And the abundance of evidence, admitted at the trial upon the framework of the pleadings and used as a basis for the instruction of the trial court to the jury, amply demonstrated respondent's violation of its duty to petitioner to furnish him a reasonably safe place in which to work and a reasonably safe method of work. Among the evidentiary facts adduced at trial was petitioner's inexperience, which has merited comment in our brief. Petitioner's inexperience is an evidentiary factor, admissible under the pleadings, and forming part of the entire fact situation surrounding petitioner's injury. Clearly, however, petitioner has not, as respondent contends, bottomed his appeal solely on this factor.

**Respondent's Conduct Viewed as a Whole Warranted a Finding of Neglect.**

The same misunderstanding of the issues involved which leads respondent to isolate petitioner's comment on his lack of experience at the task required of him, and to label petitioner's argument, as "new contentions," also leads respondent to assume that its duty was fulfilled because the culvert might be said to be safe for normal use, and because the hand torch, in itself, was not dangerous. Respondent makes this assumption in framing the questions it believes presented to this Court.

Aside from the matter of petitioner's supposed "new contentions," discussed above, respondent's principal arguments, are:

> (1) the evidence showed that petitioner slipped on loose gravel on top of a drainage culvert on respondent's right-of-way, while attempting to walk across the culvert backwards, rapidly and with his arm over his eyes. This is not sufficient to raise a jury question as to whether petitioner was provided a reasonably safe place to work, when there was no evidence that

the top of the culvert was not entirely safe for normal and foreseeable use, and when there was no evidence that respondent had any knowledge as to the existence of the loose gravel.

(2) the evidence showed that respondent removed weeds from its right-of-way by spraying the weeds to kill them, and then having its section men burn the weeds, using a torch with a three foot handle. This evidence was insufficient to raise a jury question as to an unsafe method of work.

Respondent's position is patently erroneous. It has assumed that the culvert was the whole of petitioner's place of work; it has assumed that the torch was the whole of petitioner's method of work; it has confused the routine and ordinary use of the culvert and pathway with the particular use of it at the time of petitioner's injury; it has attempted to narrow the concept of foreseeability.

To isolate the culvert and the hand torch from the entire factual situation of which they were only parts is to miss the proverbial forest for the trees. At the time he was injured petitioner was not using the culvert in pursuance of routine or ordinary duties. He was using it only as a means of escape from the flames fanned toward and upon him by the speeding train. Respondent owed petitioner a "continuing" duty to use reasonable care in furnishing him a reasonably safe place in which to work and a reasonably safe method of work. The mere fact, therefore, that the culvert was reasonably safe for ordinary use and movements is foreign to the facts and the issues here. "That duty of the carrier is a 'continuing one' . . . from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent." Bailey v. Central Vermont R. Co., 319 U. S. 350, l. c. 353, 63 S. Ct. 1062, 87 L. Ed. 1444, l. c. 1447.

The torch was simply the appliance used to light the weeds. Its handle was only three feet long. Of necessity it brought the petitioner in close proximity to the burning weeds at the time of their iguition. Thereafter, he was continuously exposed to the dangers of the fire because of the duties assigned to petitioner. These duties required him to stand on the west shoulder while respondent operated a train which fanned the flames toward and upon petitioner. The torch in and of itself might or might not be dangerous depending on its use, but it was part and parcel of respondent's method of work, which when all the elements are considered, was highly dangerous and unsafe.

At the risk of undue repetition, we herewith set out the facts showing the several elements which must be taken together in order to properly evaluate the whole. Petitioner was handed a crude, improvised hand torch (R. 9) and he was ordered by respondent to burn weeds which had been chemically prepared for the very purpose of making them ignite (R. 18). He was **required** to carry on this burning operation on the west shoulder (R. 10) in such close proximity to the tracks on which the trains were operated (R. 11, 12), that air disturbance from the trains would blow the fire toward the petitioner. In these circumstances, with the fire burning upon the shoulder, respondent operated its train upon the tracks at a speed of from 35 to 40 miles per hour (R. 34) so as to fan the flames toward the north and upon petitioner (R. 14, 16, 21). And, in addition to his duties with the fire, petitioner was **required** to watch the passing train for "hot boxes" from the west shoulder (R. 12), where he was compelled to stand by instructions of respondent (R. 13) and by the physical location of the fire (R. 28) and the prepared weeds (R. 18, 19). After petitioner had been watching for "hot boxes" for a scant two or three seconds (R. 34), the flames, fanned by respondent's train, overtook him (R. 14, 16, 21). With fire in his face, petitioner of necessity backed away quickly

onto the culvert where he was caused to fall and be injured seriously on the abnormal surface of the culvert, which did not provide a reasonably safe escape from the fire (R. 14, 15, 24, 34, 38).

" . . . All these were facts and circumstances for the jury to weigh and appraise in determining whether respondent" in furnishing "that particular place in which to perform the task was negligent." Bailey v. Central Vermont R. Co., supra. Ever since this action was instituted, petitioner has contended that the entire situation, and the whole of respondent's conduct therein, furnishes the measure of respondent's liability. This principle is not a novel one. It was expounded by this Court, speaking through Mr. Justice Holmes, in Union Pacific R. R. Co. v. Hadley (1918), 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of neglect. Upon that point there can be no question" (246 U. S. 330, 332).

Again, in Blair v. Baltimore & Ohio R. Co. (1945), 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, in words equally applicable to the case at bar, this Court stated:

> "The negligence of the employer may be determined by viewing its conduct as a whole. . . . And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern,